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Supreme Court, U.S.
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No. 98-1569

In The

# Supreme Court of the United States

October Term, 1998

MAYLON D. BROWDER, JR.,

*Petitioner,*

v.

GENERAL MOTORS CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether a predicate exists either in the record of this case or in the rulings of the court below for the removal/remand "first-served defendant" issue framed by Petitioner, the sole issue raised by Petitioner and one which is not essential to disposition of Petitioner's claim.

## PARTIES TO PROCEEDINGS

Petitioner: Mahlon D. Browder[1]

Respondent: General Motors Corporation

## RULE 29.6 LISTING

General Motors Corporation has no parent company. Separately provided to the Clerk of the Court, because of it's length and confidential nature, is a list of all General Motors Corporation subsidiaries, joint ventures, and affiliates, both foreign and domestic, not wholly owned by General Motors Corporation, as of March 29, 1999.

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[1] Maylon D. Browder's name is so spelled in the caption of his Petition and in the caption of the orders of the court of appeals. His name is spelled "Mahlon" in the record and in the remainder of this Brief.

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## STATEMENT OF THE CASE

Mahlon Browder's Petition stems from the removal of his case by Respondent General Motors Corporation ("GM") to the U.S. District Court for the Middle District of Alabama. The case was eventually decided upon summary judgment in favor of GM rendered by the district court and affirmed by the Court of Appeals for the Eleventh Circuit. (Pet. App. 1, 21.) Browder does not seek review of the merits of that decision, but attacks the district court's jurisdiction by questioning the timeliness of the removal. GM disagrees with Browder's Statement of the Case.

On May 11, 1995, after being injured in a single vehicle accident, Browder, a citizen of Alabama, filed suit in Alabama state court against GM, a Delaware corporation having its principal place of business in Michigan, State Farm Mutual Automobile Insurance Company ("State Farm"), a Delaware corporation having its principal place of business in Illinois, and Tony Pierce, a citizen of Alabama. (R1-1.) Pierce, the driver of a 1994 Chevrolet Blazer which belonged to Browder, was the sole resident defendant. (R1-1.) Browder, the front seat passenger in the vehicle, asserted an underinsured motorist claim under his own insurance policy with State Farm, a products liability claim against GM, and a negligence claim against Pierce. (R1-1.)

On May 10, 1996, GM removed the action to the United States District Court for the Middle District of Alabama, pursuant to 28 U.S.C. § 1441(a) and the "other paper" provision of 28 U.S.C. § 1446(b), based upon Browder's settlement with Pierce and Browder's evident

intent to discontinue the action against Pierce. (R1-1.) In support of removal, GM submitted an April 3, 1996, letter from Pierce's counsel making an offer to settle for Pierce's liability insurance policy limits, and a May 1, 1996, letter from Browder's counsel accepting the policy limits settlement and acknowledging that "this settlement is concluded." (R1-9-Ex. 1; R1-9-Ex. 4.) A description of the settlement correspondence considered in the district court is attached hereto as Appendix 1. Upon Pierce's absence through settlement, the United States District Court had original jurisdiction over this action under 28 U.S.C. § 1332(a) as the amount in controversy exceeded $50,000.00 (the then minimum jurisdictional amount), exclusive of interest and costs.

Browder moved to remand the action, claiming that no settlement had been reached. (Pet. App. 3-7.) The district court found that the action had become removable pursuant to 28 U.S.C. § 1446, and denied Browder's initial motion to remand. (Pet. App. 8, 9.) A motion to reconsider (Pet. App. 10, 11), in which Browder again denied any existence of the settlement, was also denied. (R1-18; R1-20.)

Pierce later filed a Motion for Entry of Judgment in the district court based upon the settlement. (R1-21.) In opposition, Browder filed his third and fourth motions to remand the action, once again denying the existence of any settlement by, in part, asserting that his counsel did not have authority to settle his claims. (R1-24; R2-30.) While confirming his earlier rejection of Browder's arguments that no settlement existed, the district court severed the dispute between Browder and Pierce over the settlement agreement, and remanded that question to the

state court for determination.[2] (Pet. App. 18-20.) The court then denied Browder's third and fourth motions to remand. (R2-43.)

Summary Judgment was granted in favor of GM against all of Browder's claims on January 27, 1998 (R6-129.) Browder appealed to the United States Court of Appeals for the Eleventh Circuit. On appeal, Browder abandoned his claim that no settlement was reached. Rather, based on a January 6, 1995, letter from Browder's counsel to Pierce's counsel demanding policy limits, Browder argued for the first time that GM's removal was untimely. Browder argued that if a settlement had actually occurred, it occurred with acceptance of his "1995 offer" on April 3, 1996, more than 30 days before removal. The 1995 letter was not, however, submitted to the district court and was not a part of the record on appeal.

On appeal, Browder sought to supplement the appellate record with the 1995 letter. On July 27, 1998, the Eleventh Circuit denied Browder's motion to add this extraneous item to the record. (Resp. App., *infra* 2.) On October 23, 1998, the Eleventh Circuit denied Browder's motion to have the Court reconsider its July 27, 1998 Order. (Resp. App., *infra* 3.) On the latter date, the appellate court affirmed the district court's judgment without an opinion (Pet. App. 1). The appellate court later denied rehearing. (Pet. App. 21.)

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[2] Petitioner and Respondent both acknowledged in briefing to the Court of Appeals that the state court subsequently found that an enforceable settlement agreement had been reached.

### A. Petitioner Misrepresents the Factual Record Before the District and Appellate Court.

The January 6, 1995, letter on which Browder relies is outside of the record. As earlier noted, GM removed based upon Pierce's April 3, 1996, written offer to settle, and Browder's May 1, 1996, written acceptance of that offer. In contending that GM's removal was untimely, Browder argues that Pierce's April 3 letter was, in fact, an acceptance of *"Petitioner's earlier offer to settle* for Pierce's policy limits." (Petition, p. 3) (emphasis added). Browder again refers, on p. 11 of his Petition, to a "prior offer to settle." Browder's argument in the Court of Appeals makes clear that the "prior offer to settle" to which he refers is the January 6, 1995, letter, which is outside the record. (Pet. App. 27, 28.) No "earlier offer to settle" exists in the record. Browder does not challenge the Eleventh Circuit's denial of his motion to supplement the record with the 1995 letter, and fails to inform this Court that the letter is outside the record.

### B. The Petitioner Misrepresents the Settlement Negotiations Leading to Diversity Jurisdiction.

Browder mischaracterizes the record when he claims that on April 3, 1996, Pierce accepted Browder's "earlier offer to settle." Browder goes further astray in failing to acknowledge that he sent an April 9, 1996, letter to Pierce responding to the April 3rd letter which reads " . . . if and when we are granted permission to settle, we *intend to accept your offer.*" (R.1-12-Ex. D) (emphasis added).

Browder also fails to point out that on May 1, 1996, he again wrote Pierce's attorney, for the first time confirming the settlement by stating, "permission is granted to settle," and "this settlement is concluded." (R1-9-Ex. 3.) It is this May 1, 1996, letter which consummated a settlement between Browder and Pierce, the non-diverse defendant, and created diversity jurisdiction giving rise to GM's removal. The record makes clear in Browder's own words, that he considered the April 3rd letter from Pierce an "offer to settle" and not an "acceptance of a prior offer."

### C. The Petitioner Fails to Identify GM as a Recipient of the April 3, 1996 Letter.

Browder asks this Court to address inconsistencies in the application of the "first-served defendant" rule. Browder deems State Farm a "first-served defendant" because it received a copy of Pierce's April 3, 1996, letter. What he fails to acknowledge is that Pierce also sent a copy of the letter to GM in the same manner and at the same time. (R1-9-Ex. 1.) Thus, even if the April 3 letter were a diversity triggering "other paper," the "first-served defendant" rule would have no application because both defendants were concurrently served.

## REASONS FOR DENYING WRIT

Browder asked this Court to consider a rule which begins a subsequently served defendant's removal clock at the time the first defendant is served. The "first-served defendant" rule, if that is a rule, has no application to this

case. It does not apply to the facts in the record. It does not apply to alter the factual determinations made by the district court and the Eleventh Circuit Court of Appeals. It does not even apply under Browder's representation of the record to this Court.

Petitioner asks this Court to resolve allegedly conflicting decisions on an issue which has no application to this case. The record regarding removal consists of Pierce's April 3, 1996, offer letter to Browder (with copies to State Farm and GM) (R1-9-Ex. 1), Browder's April 9, 1996, letter expressing a conditional intent to accept the offer at a future date (R1-12-Ex. D), State Farm's April 26, 1996, letter waiving its subrogation rights (R1-9-Ex. 3), Browder's May 1, 1996, letter stating "this settlement is concluded" (R1-9-Ex. 4), and GM's May 10, 1996 removal (R1-1). No offer by Browder to be "accepted" on April 3, 1996, by Pierce exists in the record. Rather, the record establishes that the May 1, 1996, letter from Browder to Pierce "concluded" the settlement, giving GM the right to remove. Removal is triggered when Plaintiff "by his voluntary act has definitely indicated his intention to discontinue the action as to the non-diverse defendant." *Lesher v. Andreozzi*, 647 F. Supp. 920, 922 (M.D. Pa. 1986) (citing *Powers v. Chesapeake & O. Ry. Co.*, 169 U.S. 92 (1898)). GM then removed on May 10, 1996, within 30 days of settlement. (R1-1.) Under the facts, the "first-served defendant" rule has no application.

Browder does not ask this Court to disregard the district court's implied factual findings leading to the conclusion that a settlement with Pierce had been made, and that GM's removal was proper, or to reverse those

factual findings. Necessary to the judgments of the district court and the Eleventh Circuit was the determination that Pierce's April 3, 1996, letter did not consummate a settlement and did not create the right to remove. Rather, the courts determined that Browder gave notice that he was abandoning his claim against non-diverse defendant Pierce through settlement on May 1, 1996, when Browder's counsel wrote Pierce to accept Pierce's offer of April 3, 1996. As no enforceable settlement existed prior to May 1, 1996, no party had the right to remove before this date. GM removed this case within 30 days of May 1, 1996, the date Browder accepted Pierce's April 3, 1996 offer. GM's removal was timely.

The courts below determined Browder's May 1, 1996, letter accepting Pierce's settlement offer of April 3, 1996, created diversity jurisdiction, and started the removal clock ticking. This Court is presented with no request or reason to disturb those factual determinations. For the Petition to be granted, this Court would have to disregard both lower courts' factual determinations. This Court is a court of law rather than a court for correction of errors in fact finding. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 276 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Supreme Court does not grant certiorari to review evidence and discuss factual findings). This Court does not undertake to review concurrent findings by the district court and the court of appeals in the absence of a very obvious and exceptional showing of error. *Graver Tank*, 336 U.S. at 276. Where the ultimate facts are subject to the "clearly erroneous" rule, and their review would be of no importance save to the litigants themselves, the Petition for Certiorari should be

denied. *See Rudolph v. United States*, 370 U.S. 269, 279 (1962).

Even under Petitioner's version of the facts, the "first-served defendant" rule has no application. First, even if the January 6, 1995, letter were of record, its admission would not render the factual findings of the district court and court of appeals clearly erroneous and create an exceptional showing of error. Based on Browder's own correspondence of April 9, 1996, and May 1, 1996, Browder considered the April 3, 1996, letter from Pierce as an "offer," and not a conclusion of settlement. Second, Petitioner fails to note that GM and State Farm were both sent the April 3, 1996, letter in the same manner and at the same time (by carbon copy service upon their trial counsel). There is no record as to whom actually "received" the letter first, State Farm or GM. In fact, the record does not establish when either State Farm or GM received the April 3, 1996 letter, or that such receipt was more than 30 days before removal.

If the April 3, 1996, letter were an "other paper" giving notice of the right to remove, the record does not show that one defendant as opposed to the other was "first-served" with this notice. As such, the record does not present the "first-served defendant" issue raised by Browder to pique the Court's interest. This Court is simply not presented here with a case which asks the question, "If one defendant is served a removable state court petition before the other defendants, does that start the 30-day removal clock ticking for all defendants?" Nor is the Court presented with a case which asks, "If one defendant receives notice before the other defendants of a settlement with the only non-diverse defendant, does that

start the removal clock ticking for all defendants?" This case, even under Browder's view, presents a factual scenario which does not raise the question Browder presents.

## CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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| DATE | DOCUMENT |
|---|---|
| April 3, 1996 | Pierce's attorney writes Browder's attorney offering the $20,000.00 policy limits. Pierce's attorney requests that, prior to settlement, Browder provide assurances regarding potential outstanding medical liens. Copies provided to counsel for GM and State Farm. (R1-9-Ex. 1.) |
| April 9, 1996 | Browder's attorney responds to Pierce's attorney with copy to State Farm indicating "if and when we are granted permission to settle by [State Farm], we intend to accept your offer," and "I would request that [State Farm] give this a look, so . . . settlement can take place . . . " (R1-12-Ex.D.) |
| April 26, 1996 | Counsel for State Farm writes to both Browder's and Pierce's attorneys advising that State Farm waives its right to subrogation and "is thereby agreeing to allow Mr. Pierce's insurer to settle with [Browder] for its policy limits." (R1-9-Ex.3.) |
| May 1, 1996 | Browder's attorney writes Pierce's attorney, enclosing the April 26, 1996, letter, and in light of the waiver by State Farm, acknowledges "permission is granted to settle" and that "this settlement is concluded". (R1-9-Ex.4.) |
| May 10, 1996 | GM removes the action to the United States District Court for the Middle District of Alabama. (R1-1). |

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 98-6155

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MAYLON D. BROWDER,

Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

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Appeal from the United States District Court for the Middle District of Alabama

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(Filed July 27, 1998)

ORDER:

Appellant's motion to supplement the record on appeal is DENIED.

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 98-6155

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MAYLON D. BROWDER,

Plaintiff-Appellant,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

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Appeal from the United States District Court for the Middle District of Alabama

(Filed Oct. 23, 1998)

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Before TJOFLAT, BLACK and MARCUS, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of this Court's order of July 27, 1998, is DENIED.

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